UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIGNA RUIZ, DARA SW HO,

Plaintiffs,

v. 10 CV 5950(JGK)(THK)

CITIBANK, N.A.,

Defendant.

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FREDRICK L. WINFIELD, et al.,

Plaintiffs,

v. 10 CV 7304(JGK)(THK)

CITIBANK, N.A.,

Defendant.

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New York, N.Y.
December 20, 2011
10:30 a.m.

Before:

HON. JOHN G. KOELTL
District Judge

APPEARANCES

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(Case called)

THE COURT: Good morning all.

Whenever I have a Citibank case, I explain that I have a checking account and a mortgage with Citibank. My former firm, Debevoise, has represented Citibank, used to be the trust side of Citibank and it may or probably is broader. So far as I know, they are not involved in this case. I never did any work with Citibank that places it on the list of people for whom I did sufficient work in practice 17 years ago for which I disqualify myself, but I bring all of that to your attention at the outset. There is nothing about any of that that would affect anything that I do in the case.

There are several motions before me. Let me raise a minor one with you all first.

There was a motion to seal that was brought by the plaintiffs. It was to seal certain documents in connection with the motion, and I don't believe the motion was opposed. Am I correct?

MR. MacFALL: That's correct, your Honor.

THE COURT: That motion is docket number 63 and that motion is granted without opposition.

There are three other motions, I believe.

One is the motion to dismiss the ERISA claims and the California class claim and the injunctive relief claim. I will listen to that motion first and listen to the conditional

certification motion. There is also a motion to strike that goes with the conditional certification.

MR. LINTHORST: Thank you, your Honor.

Your Honor, we bring a motion to dismiss and request that the Court do three things: That it dismiss the ERISA causes of action which are the first and second claims; that it dismiss or strike the California class claim which is the sixth claim; and that it strike the claims for injunctive and declarative relief.

I would like to start with the ERISA claims. As I am sure your Honor is aware, this is an overtime case. Plaintiffs are former personal bankers who allege that they worked at Citibank and that they were not paid for all overtime work. The ERISA claims that they bring are entirely derivative of their overtime claims. They essentially say, the failure to pay them overtime, as they claim they should have been, is also an ERISA violation. Numerous courts, including courts in this circuit and in the Third Circuit and others have rejected this attempt.

There are essentially two claims. One is a recordkeeping claim and one is a breach of fiduciary claim.

ERISA requires an employer to maintain records with respect to each of its employees "sufficient to determine the benefits due or which may become due to such employees." That is from Section 209(a)(1) of ERISA.

So in order to determine what records need to be kept and whether there is any breach of a recordkeeping requirement, it has to be determined what records are sufficient to determine the benefits, and that depends on how benefits are calculated. So we have submitted --

THE COURT: You also maintain at the outset that there is no private right of action for a violation.

MR. LINTHORST: That is correct, your Honor. That seems to be essentially undisputed. Plaintiffs don't purport to bring a Section 209(a)(1) cause of action. They seek to bring a recordkeeping claim under Section 502(a)(3), the illicit catchall for injunctive and declaratory relief. So that is true. We don't believe that there is any private right of action under 209. I don't think that is disputed, but we can hear from the plaintiffs next.

We also believe that 502(a)(3) is not an appropriate vehicle for that claim because it is essentially a claim for benefits. But before even getting there the question -- that is certainly an issue --

THE COURT: It is a chicken-and-egg as to which comes first.

MR. LINTHORST: Sure. Just touching on that --

THE COURT: No. I understand the argument, so you don't have to repeat it and I didn't see an answer to it.

MR. LINTHORST: So, facially, the question is what

does the plan require for crediting benefits under the 401K plan, and we have quoted the language at page 6 of the SPD which says that credited with eligible pay which must be earned and paid by an eligible employee of the company and is made up of the following: Base pay plus overtime and shift differential paid to you during the calendar year. So in order to maintain records sufficient to determine benefits under a plan that requires credit for amounts paid to you during the calendar year, you must maintain records of what was paid to you during the calendar year.

THE COURT: Right. The plaintiff would say that that's an invitation to circumvent ERISA by simply having people not record their hours which they should be paid for and for which they should accrue benefits under the plan.

MR. LINTHORST: Well, it is not an invitation to circumvent ERISA. It may give rise to an FLSA claim, but it doesn't give rise to an ERISA claim because the terms of the plan say that you pay the benefits based on amounts paid, and it is not an ERISA violation to have that term in an ERISA plan. What they are essentially saying is, even though that was a lawful term of an ERISA plan, you should have done something different than what the plan said. You should have maintained records of hours of work or what should have been paid when the plan itself says, we credit based only on amounts paid. So that's the Henderson case from the Third Circuit

which dismissed on that basis.

There was a factual dispute over what the plan said. The plaintiffs said that the plan doesn't say only that amounts actually paid are what gets credited but that it is actually hours of service and they cite to the hours of service definition.

THE COURT: But the hours of service that they are using relates to another provision of the plan for part-time employees.

MR. LINTHORST: Correct. It only applies to people scheduled to work 20 hours or less or temporary employees.

THE COURT: Neither side put in the full plan, right -- that is not before me -- you put in extracts of the plan?

MR. LINTHORST: We put in the full SPD and, I believe, an extract of the plan, together with a declaration.

THE COURT: Could you give me the full plan?

MR. LINTHORST: Sure.

THE COURT: Just submit the plan with an affidavit by the end of the week.

MR. LINTHORST: So, initially, there is no recordkeeping violation because we kept the records sufficient to determine benefits. There is also no recordkeeping violation because there is no private right of action under 209 and courts have rejected efforts to bring it under 502(a)(3).

The breach of fiduciary duty claim essentially follows the same logic which is, even assuming Citibank is a fiduciary and even assuming this is a fiduciary function, Citibank couldn't have breached a fiduciary duty by doing exactly what the plaintiff said, namely, crediting people with amounts paid. But beyond that, it is not a fiduciary as it relates to this. Fiduciary functions are discretionary functions. There are no facts pled that Citibank had discretionary decision-making as to what to credit to the plan. The plan is very clear, it is amounts paid and not amounts that should have been paid for hours worked.

And, essentially, this is, again, a wage-and-hour case. Payment of wages is a business function, and numerous courts, including the Barrus case and the DeSilva case that we cite have held to such and have rejected the plaintiff's authority, which is the Stickle case out in California which has been rejected by these courts and numerous others.

And essentially the policy is this. Courts have been unwilling to turn ERISA plans and ERISA fiduciaries into wage-and-hour plans. They have a claim under the FLSA. This just isn't an ERISA matter. Even if it was, we also submit that it should be dismissed for failure to exhaust plan remedies.

Turning to the California class claim, I would like to start with what we think is the common sense proposition that

the Federal Court in New York need not and should not adjudicate California state law claims with respect to a California-only class when those claims are already being litigated by a California state court that was filed before this case.

THE COURT: Aren't all of your claims with respect to the California class and with respect to Colorado River premature? Mr. Shen is a resident of California. He has a California claim. Your arguments under Colorado River are that it would be really duplicative of the class action that is pending in California to have a class action here in New York. I have not been asked to certify a class. I have an individual claim now by Mr. Shen.

Do you contend that under Colorado River, I should dismiss or stay Mr. Shen's claim because he is a member of the class in California?

MR. LINTHORST: Well, if Mr. Shen would like to maintain an individual claim before this Court, he may do so.

THE COURT: So that claim in the case, which is a claim under California law which is being asserted by Mr. Shen has to be, first of all, a personal claim. He has to have a valid claim under California law and then he seeks to represent a class of others similarly situated. But I don't have any class action motion before me, and in order to maintain a class action, the plaintiffs would have to show by a preponderance of

the evidence that they in fact have met all of the requirements for a California class claim.

Why wouldn't it be appropriate at that point when there is a class action motion to deal with the issues of Colorado River, whether I should certify a class when there is a California class in California and to deal with the issue of standing for injunctive relief? There could be other members of the class, if I thought so, if I certified a class who in fact were current employees, right?

MR. LINTHORST: The answer is, your Honor, if the class claim persists, we are subject to class discovery with respect to the California class that could be duplicative of what is going on in California and we shouldn't have to brief and your Honor shouldn't have to decide the question of class certification for a California class that is already going to be decided by a California court.

THE COURT: I don't have that motion before me. If in fact such a motion were made, then I would have it. It seems that this motion, as I said, is premature; it seems like an end run around the class procedures.

MR. LINTHORST: Your Honor, the point of this abstention is to avoid the exertion of time in litigating and going through discovery and deciding that question when it is already being litigated and going through discovery and being decided in California.

THE COURT: I don't know. For example, you say all of the exertion that would be made with respect to discovery of a possible class action in California, I don't know what the scope of that discovery is. I don't know what the burden of that discovery is. I know that I have an individual claim on behalf of Mr. Shen under California law. There is nothing in the papers before me that says this is going to be burdensome. I also don't have, I don't believe, the details of the status of the case in California. I know that there is a class action, obviously, in California. Has it been certified?

MR. LINTHORST: It has not been certified. They have been proceeding through discovery with respect to the plaintiffs filing a motion for class certification.

THE COURT: And that is pending in state court in California?

MR. LINTHORST: The case is pending in state court.

THE COURT: You know, the normal rule is, absent extraordinary circumstances, the Court does not decline to exercise jurisdiction. This is, to me, a curious motion because, normally, Colorado River says, dismiss or stay in favor of a state court action, but you should do that only under extraordinary circumstances, and there's no prohibition against the federal case and the state case proceeding until such time as there becomes some sort of conflict. Indeed, both cases could move on toward judgment. And here, I have an

individual claim. I am not being asked to dismiss the claim. Colorado River normally is, you dismiss a case or you dismiss a claim. I am not being asked to dismiss a claim. I am being asked to dismiss part of a claim, the class action aspect of the claim.

Is there another case under Colorado River that is in that posture?

MR. LINTHORST: I think it is a unique posture and I think, technically, we have moved to dismiss the claim. But if Mr. Shen's position was that he wanted to proceed with an individual claim and would opt out of any class in California, well, he obviously has the right to do that.

THE COURT: But his claim, necessarily, is an individual claim that he also seeks to bring on behalf of a class. So he does have an individual claim. And you have moved to dismiss his claim because he also seeks to bring the claim on behalf of the class.

MR. LINTHORST: Right, because that claim is pending in California in a previously filed case.

THE COURT: No case that supports the use of Colorado River in those circumstances?

MR. LINTHORST: Well, we cited cases that say that the actions don't need to be identical.

THE COURT: I know.

MR. LINTHORST: But I don't have a specific case where

there is an individual claim and a class claim, but because there is a class claim, we will be litigating that claim. We don't know the scope of it, but whatever the scope of it is, the claim is duplicative of what is in California, and we will be litigating whether it can be litigated on a class basis which is duplicative of the issue in California. If it was in federal court, it would be the first-filed rule and it would be well settled that the case should go to where the first-filed case was. Because it is in state court, we have the Colorado River issue, but it is guided by wise judicial administration and conservation of resources. And if you look at the factors, they all line up in favor of the California case. It was first filed. It is state --

THE COURT: That's OK. I know the factors. I don't know the details of the California action. I don't know how long it's been pending, the state of the action, whether the claims in California are going to be timely adjudicated in California.

The normal rule is, as you know, you don't stay a proper federal case simply because there is a parallel state case. Both cases can move on to judgment. And the caveat to that is that the federal claim -- if there is a problem in terms of timeliness -- but OK, no case but I will look at it.

Whatever I do in terms of the Colorado River issue, seems -- unless I dismiss it -- is without prejudice to the

issue being raised again either at the class action stage when there's a motion for class certification or, subsequently, if in fact the discovery, if there is discovery on the class claim for the California claim, turns out to be burdensome and duplicative of the discovery that is going on in California -- I am not saying that is dispositive, but I am saying that it would tilt the balance in favor of staying federal jurisdiction, but at least it is an issue to be concerned.

The gist of the motion at this point is, Judge, there is another class action that is pending in California, and it was brought first and it is in state court, so save your time, save your breath, even though you are still going to have an individual claim by the California resident under California law.

MR. LINTHORST: The scope of that claim in terms of discovery, in terms of motion practice, in terms of issues is very different than the individual claim.

THE COURT: We are going to have to take a break for a few minutes because I have a criminal matter, and then we will resume with this.

You can probably leave your papers on the desk.

(Recess)

(Continued on next page)

THE COURT: Mr. Linthorst.

MR. LINTHORST: So just continuing, your Honor, I believe we have submitted the complaints from the Davis case. I don't believe there is any dispute that the California claims in this case are subsumed within the Davis case. I am happy to provide some evidence as to the status of the Davis case.

THE COURT: No. I will decide the motion based on what I have been given, not based upon afterthoughts.

You also argue that I should strike the class action allegations with respect to the California claim because Mr. Shen fails the adequacy requirement and class action is not superior to other forms of adjudication.

But, again, why aren't those claims appropriately raised in response to a class action motion in which the plaintiffs would have to establish by a preponderance of the evidence that those requirements were met, and why would you want a decision which says that the plaintiff has alleged enough under the notice requirements of Rule 23 to make sufficient allegations for a class? Whether those requirements will ever be established by a preponderance of the evidence, we don't know, but you make a motion and you start behind because all the plaintiff has to do is to make sufficient plausible allegations at the pleading stage. We are not at the class action certification stage. So why isn't that motion premature, if not ill-advised?

MR. LINTHORST: It essentially goes to the same substantive question for the Court, at least the superiority piece, which is, why are we litigating a putative California class action as to California claims when those same putative claims and that same putative class are being litigated in a California state court?

THE COURT: Because the California claims overlap with the federal claims which are here in this case and because plaintiffs say that the policy that applied in California was similar to the policy applied in other states and they seek classes, subclasses in individual states and the case that is pending in California is a smaller case and in state court dealing only with the state class. And so it doesn't immediately jump out at you if you have to have discovery on a FLSA claim which goes to many different states but includes California. It doesn't immediately jump out that you can say at the pleading stage that a California state class action would be the superior way of adjudication. We are only dealing at the pleading stage.

MR. LINTHORST: There are a number of California claims beyond overtime -- incorrect wage statements, meal and rest, failure to pay wages that are not part of the --

THE COURT: And you say he is not an adequate representative with respect to all of those?

MR. LINTHORST: With respect to those, and that

litigating those distinct claims that are not duplicative or overlapping with the FLSA claims in this case does not make wise judicial administration when it is happening in California. If it would be wise judicial administration for the Court to send that claim to another federal court under the first-filed rule, it doesn't seem to be any less wise because the same claims are pending in the state court.

THE COURT: Presumably, it is not so clear that the case would be divided up, and we have the FLSA claim which doesn't exist in the California state court. There is no FLSA claim in the California state court?

MR. LINTHORST: There is not.

THE COURT: If there was, maybe it would have been removed.

MR. LINTHORST: Presumably.

THE COURT: Anything else?

I have the same issue with respect to injunctive relief and whether that is premature, whether there can be plaintiffs who have a claim who are current employees and, therefore, entitled to injunctive relief.

MR. LINTHORST: In terms of class injunctive relief, what the Supreme Court recently said in Wal-Mart v. Dukes that the Ninth Circuit appropriately dismissed the claim when former employees brought the claim because former employees don't have standing and the appropriate remedy by the District Court would

not be to call the class of the former employees but not to have a (b)(2) class at all.

THE COURT: Right. I understand Wal-Mart.

If the class includes current employees, the injunctive relief would be proper, right -- could be, at least in overcoming a standing argument?

MR. LINTHORST: Not in a Rule 23 class action where the named representative is a former employee.

THE COURT: But they can join other representatives.

MR. LINTHORST: If they joined a current employee plaintiff, which they have not done, that current employee plaintiff might have an individual claim for declaratory injunctive relief, but could not have a (b)(2) class claim.

THE COURT: Are the class claims here only (b)(2) or are they also (b)(3)?

MR. LINTHORST: Also (b)(3).

THE COURT: The Supreme Court decision was really talking about the (b)(2) claim. There is no (b)(3) claim?

MR. LINTHORST: Right, it wasn't (b)(3), but it was Rule 23(a) and (b)(2).

THE COURT: But the injunctive relief, really, the issue went to the (b)(2) claim?

MR. LINTHORST: Correct.

THE COURT: Thank you.

Plaintiff.

MR. MacFALL: Good morning, your Honor.

THE COURT: Good morning.

MR. MacFALL: Your Honor, with respect to the ERISA claim --

THE COURT: Refresh my recollection who you are.

MR. MacFALL: Timothy MacFall.

THE COURT: Thank you.

MR. MacFALL: Your Honor, we have obviously cited authority in our papers that is contrary to that cited by the defendant, but I would like now to focus on the authority actually cited by the defendant. And we respectfully submit that even under that authority, plaintiffs should prevail on the ERISA claims. The reason for that is that the defendants have, to some extent, mischaracterized the nature of the duty and the language of the plan from which it derives.

The defendants have taken the position in their papers that the plan requires only that contributions be made based upon what was paid to the plan participants. What the SPD actually states at page 6, which is Exhibit A, under the caption "Eligible Pay," that is defined -- it says: "Eligible pay must be earned and paid while you are an eligible employee."

While admittedly it does have the term "paid," the inclusion or the other requirement that eligible pay must be earned gives rise to implications and requirements that don't

pertain solely, if it only included compensation that was paid. That's probably most clearly articulated in one of the cases that defendants rely upon, the DeSilva case. In that case, the court carefully analyzed a claim similar to that asserted here. The court noted that, if the claim was solely based on language in a plan that was limited to compensation paid, then plaintiffs would lose.

The court, however, undertook an analysis of the relevant precedent concerning that and noted that, where the plan provides for some other factor in the definition of "compensation" such as hours worked or compensation earned, that that gives rise to a fiduciary obligation on the part of the employer to actually insure that the contribution is being made to the plan on behalf of plan participant is accurate.

Your Honor, the SPD makes clear in its definition of "eligible pay" that that includes pay that is earned or compensation that is both earned and paid. The SPD also in a separate provision which does not control but is supportive indicates that eligible pay for employees who are terminated -- it actually says, "any of the above amounts otherwise received after your termination of employment but earned through services performed before your termination of employment with the company."

Again, we would note that it is significant because, again, it is an emphasis in the plan on the notion of wages

having been earned.

With respect to the hours of service provision, the defendant correctly notes it relates to part-time or temporary employees. Again, there is the notion or emphasis on compensation being earned. It is not simply a question of what they were paid.

Perhaps, what best underscores this point is that in the SPD the company itself makes clear, and I quote: "Not all of your taxable compensation is counted as eligible pay, therefore, the amount of your taxable income as shown on your Form W-2 Wage And Tax Statement is likely to be different from your eligible pay."

THE COURT: What is the page number?

MR. MacFALL: I'm sorry, your Honor. That is on the same page, page 6.

Your Honor, that language that I just read differentiates this case from those cases relied upon by defendants that relates solely to pay. Here, the company itself is acknowledging that the amount that plan participants receive is not necessarily the same as eligible pay, and in that earlier provision that is defined as pay that is actually earned and paid.

THE COURT: That goes to deductions, doesn't it; it doesn't go to hours worked and not paid?

MR. MacFALL: The portion relating to the W-2, your

Honor, probably does go to deductions and other compensation. The point I am making --

THE COURT: And the language with respect to how you treat someone after they are terminated, your right doesn't apply here. So you are left with the one reference in the SPD to earned and paid which appears to require that it be paid, yes? Earned but, yes, paid, and if not paid, not eligible, right? Right?

MR. MacFALL: Your Honor, I believe that in order to satisfy the plan requirements, that the company need determine both earned and paid.

THE COURT: Why? The ERISA benefits apply only if it is both earned and paid, and so if it is not paid, the benefits don't accrue under ERISA, right?

MR. MacFALL: They may not accrue under ERISA, your Honor, but the question with regard to whether it gives rise to a fiduciary obligation to ascertain the accuracy of those contributions and whether everything that was paid was in fact paid --

THE COURT: If you say there's a fiduciary obligation on the part of the administrator to assure that all overtime is in fact paid so that ERISA benefits are triggered then, of necessity, every violation of the Fair Labor Standards Act is a violation of ERISA, right?

MR. MacFALL: Yes, your Honor.

THE COURT: And there is no case that tells that, right? They have cavilled and whatnot, but no case has held that, right?

MR. MacFALL: Right.

THE COURT: And that would be a pretty dramatic sub rosa expansion of the Fair Labor Standards Act because it would turn every Fair Labor Standards collective action into a class action, right?

MR. MacFALL: Yes.

THE COURT: They would all be turned into opt-outs rather than opt-ins, right?

MR. MacFALL: Correct.

THE COURT: And there is no case that has ever said that?

MR. MacFALL: That's correct, your Honor.

But what it does say, however, is that where the language of the plan is not limited exclusively to the amount that is paid --

THE COURT: But even if there is a case that said that, what sense does it make, right? If the plan says it has to be earned and paid, then ERISA benefits wouldn't be triggered if the underlying compensation wasn't paid, right? Putting aside what some court -- no Court of Appeals -- but one of us said makes no sense, does it?

MR. MacFALL: Well, your Honor, with respect to

whether or not the Court of Appeals has opined on this, what the Third Circuit has done with this issue directly, it has held that it is to insure that the contributions were being properly provided to the plan -- I'm sorry, I will paraphrase, it is easier -- the Third Circuit essentially has held that the duties imposed upon the employer depend upon the language in the plan itself.

THE COURT: We can all agree on that.

MR. MacFALL: I am starting at the beginning, your Honor.

The defendant's position is that the plan requires only -- or provides only that eligible pay is comprised of compensation that is paid.

THE COURT: The ERISA benefits are not triggered unless the compensation is paid, and if the plan says earned and paid, a requirement is payment and if the benefits are not paid, the ERISA benefits are not triggered.

MR. MacFALL: Your Honor, I guess what I am suggesting is that the "earned" language in the plan for these purposes also gives rise to a fiduciary obligation on behalf of the employer to ascertain the --

THE COURT: But the question would be, among others, why an ERISA fiduciary duty -- it would appear to go beyond what you would normally think of as the fiduciary duties of an ERISA fiduciary to police the payroll practices of an employer.

MR. MacFALL: Your Honor, it goes beyond that to the extent that as fiduciary, there is an obligation to insure that all of the contributions to the plan that are required are actually made, and that is the plan benefits, separate and apart from being policing payroll requirements. It assures that the plan receives and can invest for the benefit of its participants overall -- all of that to which it is entitled by the express provisions of the plan.

So to that extent it implicates the fiduciary obligation of the employer. Whereas here, the employer-- it is the same entity that is basically making the determination that it will not pay all of the overtime to which the employees are due and, simultaneously, understands that under the SPD it is required to ascertain the accuracy of the contributions to the plan based on pay that is earned and paid.

THE COURT: You don't dispute that there is no private right of action for the recordkeeping requirement of ERISA, is that right?

MR. MacFALL: Your Honor, the complaint alleges violation and seeks relief under 502(a)(3).

THE COURT: My question was, there is a specific recordkeeping provision of ERISA, 209?

MR. MacFALL: Yes, your Honor.

THE COURT: You don't dispute that there is no private right of action for a violation of that provision of ERISA, is

that right?

MR. MacFALL: Your Honor, for these purposes, we do not. I would note that there are cases -- and which we have cited -- that have held that there are. I am aware of other cases that hold -- for these purposes, we will not dispute that.

THE COURT: So no private right of action for violation of Section 209(a)(1), right?

MR. MacFALL: Right.

THE COURT: If that's right, why wouldn't it be an end run around that proposition to attempt to have a private right of action for exactly the same violation and just say it is now brought under 502(a)(3)?

MR. MacFALL: Your Honor, it really depends on the purposes for which the relief is sought. Here, it is being brought under 502(a)(3). We submit that it is brought on behalf of the plan by plan participants, based upon defendants' inadequate contributions to the plan --

THE COURT: That provision only applies for equitable relief, right, not a claim for benefits?

MR. MacFALL: Yes, your Honor.

THE COURT: Aren't these really claims for benefits?

The plaintiffs are seeking their ERISA benefits for the overtime that they worked and allegedly were not paid, right? They are not eschewing money, right? They are looking

for the ERISA benefits that they claim should have been paid, right?

MR. MacFALL: Yes, your Honor, most respectfully, but that would be a byproduct, we would submit, of the equitable relief.

THE COURT: I'm sorry?

MR. MacFALL: That would be a natural byproduct or result of the equitable relief if it were granted.

Your Honor, we would note that even the cases relied upon by defendants don't go so far as to say that there can never be an equitable claim under 502(a)(3) if it is consistent with the language of the plan. For example, one of the clear examples cited by the cases is, if the plan provided that contributions would be made based upon hours worked -- just using that as a hypothetical for the moment -- if all else were equal, the plaintiffs in such scenario would also receive monetary benefits to the extent that they would obtain those ERISA contributions that had previously been withheld from them.

However, the courts that have looked at that have indicated that you could bring a recordkeeping violation through 502(a)(3) seeking injunctive relief on behalf of the plan under those circumstances, even though there would be a monetary benefit conferred upon the plaintiffs as a consequence of obtaining that equitable relief.

THE COURT: Those are a minority of cases.

MR. MacFALL: I believe, your Honor, that the majority of the authority cited by the defendants and of which I am aware have not held that there is a -- or that plaintiffs are precluded from seeking equitable relief under 502(a)(3) for recordkeeping violations simply because they would also obtain a monetary benefit.

My understanding of those cases is that really the decision turned -- as well as on plaintiffs' case -- on the language contained in those plans for the most part, if not exclusively, have indicated that eligible pay was limited to compensation actually paid. And some of the cases go as far as to say that compensation is reported on the W-2 form.

THE COURT: I know you haven't turned to the class issues and Colorado River. Anything else that you want to tell me on this?

MR. MacFALL: No, your Honor.

THE COURT: Then I can deal with the criminal case now and we will resume.

(Recess)

(Continued on next page)

THE COURT: Mr. MacFall.

MR. MacFALL: Thank you.

I will be very brief with respect to the California class claims.

As your Honor indicated, it is premature at this point. Certainly prior to the time that we moved for class certification with respect to defendant's complaint, that is, that Mr. Shen is a former, and to protect the interests of current employees, we would note that it is not uncommon under Rule 23 to proffer a class representative different than the named plaintiff just to satisfy standing requirement. If and when the time comes to make that motion, certainly those are issues that need to be addressed at that juncture.

One of the issues that your Honor picked up on and we would note is, to the extent that defendant argues burden and duplication of effort, many of the issues that would arise in a California case would necessarily arise in the context of the FLSA claim because the underlying nexus of both claims is the same.

Because both claims deal with common issues and in view of the fact that the same factual determinations would be made in connection with the California claim or the FLSA claim, we do not believe that this --

THE COURT: Keep your voice up.

MR. MacFALL: -- Court is any less convenient than the

California state court for the adjudication of these claims.

Your Honor, I would just note as an additional matter, because Mr. Linthorst did indicate that the state case has not yet been certified, the prematurity of the relief they seek here is underscored by the possibility that the state action may never be certified as a class action and that this Court is being asked, at this premature juncture, to abstain from exercising jurisdiction over a claim before it knows that it would necessarily result in unnecessary duplication.

THE COURT: How burdensome is the discovery? Is there any discovery that is being sought in connection with the California class claim that is not being sought with respect to the FLSA claim in California?

MR. MacFALL: None currently and none that I can think of, your Honor.

THE COURT: Thank you.

MR. MacFALL: Thank you, your Honor.

THE COURT: I will now listen to the collective action motion.

MS. WALSH: Good morning, your Honor.

Murielle Steven Walsh for plaintiff Ruiz.

THE COURT: Please keep your voice up or speak from the podium.

MS. WALSH: I think I might need the podium.

We are asking that the Court --

THE COURT: You are Ms. Steven Walsh?

MS. WALSH: Steven Walsh.

THE COURT: Thank you.

MS. WALSH: We are asking the Court to conditionally certify for FLSA purposes a collective of all current and former Citibank employees who worked in the position of personal banker. The potential class is approximately 4,000 personal bankers. Citibank has branches in about 13 states.

As the Court is aware, certification of an FLSA collective is a two-step process. Right now we are at the first stage. And our burden is quite lenient. We only need to make a modest showing that there are others who may be similarly situated to our client and make some kind of plausible claim that there is a common practice that results in the personal bankers being denied overtime. We feel that we have more than met our burden at this stage.

Our clients have testified to a dual-edged policy that, on the one hand, personal bankers were given very vigorous job duties that required that they work overtime pretty regularly and that included meeting very high sales quotas. And they testified that these high sales quotas played a large part in requiring overtime.

On the other hand, Citibank corporate had implemented a directive that overtime was not permitted or, at a minimum, strongly discouraged. The natural result of this policy, your

Honor, was that overtime was performed but not all of it was paid. We haven't contended that no overtime was paid, just not all of it. Whether through branch managers altering time records or through personal bankers being intimidated into underreporting their hours, the common effect was the same -- not all personal bankers were compensated for all overtime worked.

THE COURT: You argue for two aspects of what you claim is similarly situated, right, a policy that requires quotas, but the quotas can't be satisfied except by working overtime and reporting overtime or paying overtime is discouraged. The second aspect of similarly situated is that people work overtime and either don't put in or falsify their records, but they work overtime and they are not paid?

MS. WALSH: Right.

THE COURT: The first aspect of the similarly situated, is that a violation of the FLSA, or is it only the second -- they work hours and they are not paid.

MS. WALSH: It is the effect, your Honor, that is the violation of the FLSA.

THE COURT: The violation of the FLSA is they work hours that are overtime and they are not paid, right?

MS. WALSH: That's right.

THE COURT: If this case went to trial, what would the relevance of the first part be? It is not a violation of the

FLSA, right? Background?

MS. WALSH: I think it is more relevant at this juncture because we are trying to show that, for purposes of notifying potential collective members, we are trying to show that we think that more than just our clients were effected. We think that because Citibank had these nationwide job duties and sales quotas that, very likely, there are other people who are similarly situated to ours.

At the end of the day when we go to trial, after we have had discovery, then we would have access to Citibank's records and we can simply compare the time that people worked versus the time that they were actually paid. And we think that will be a fairly simple thing to do because we know that Citibank maintained audit logs that recorded personal bankers' log-in and log-out times. And they actually used those audit logs to verify that personal bankers were recording their time accurately.

What they did with those audit reports, we don't know yet; we have gotten very little discovery so far, but we think that the results of that discovery will be very helpful.

THE COURT: But all of this information about the policy and the quotas and everything else is irrelevant to the violation of the FLSA, right; the violation of the FLSA is only worked overtime not paid?

MS. WALSH: To the ultimate proof, I would agree with

that, your Honor.

THE COURT: Why then is it really relevant for purposes of a collective action that the plaintiffs and the opt-ins are allegedly similarly situated with respect to a policy that is not an element of an FLSA violation and not determinative of any issue that will be an issue for trial?

MS. WALSH: Again, I think it is really more relevant to this stage --

THE COURT: I know you say that. I know you say that, but what I am trying to get at is what that really means.

To say that the plaintiffs are similarly situated for purposes of an FLSA collective action, you say, they can be similarly situated for an aspect that is irrelevant to the elements of the FLSA claim, they just have to be similarly situated. And I'm saying, what does that mean?

Of course, they are similarly situated. They are all personal bankers employed by Citibank. So they are similarly situated. They are personal bankers employed by Citibank. The question is, when the cases talk about similarly situated, do they mean similarly situated in terms of background or do they mean similarly situated under the terms of Wal-Mart, an aspect that can be decided, the answer to which will resolve a dispositive issue at trial, or is that principle of Wal-Mart which arises in the context of Rule 23 simply irrelevant to what you term is the first step of the FLSA consideration?

Is the first step of the FLSA consideration simply, get a group of people together who are similarly situated in order to encourage the disposition of FLSA claims, even though they are gathered together on a similarly situated principle, which is not an element of an FLSA claim and will not be an element at trial?

Maybe that is right, but I want to find out what your answer is.

MS. WALSH: I will try to answer. There are about three questions in there.

In terms of what we need to show right now, who is similarly situated to who, I tend to agree with your Honor that the fact that all of these personal bankers have the same job duties and there are thousands of them across the country, I think that makes a very good, at least, beginning of a showing that they are similarly situated people to our client.

But the defendants would argue that we need to show more than that even at this early stage, that we need to show that there are others similarly situated who were impacted with the same FLSA violations and in the same manner. And so to that end, I think it is rather relevant the fact that these sales quotas, these nationwide job duties apply to everybody and impose the same type of pressure from coast to coast, Wherever a personal banker is working.

In terms of Wal-Mart, I would never agree that

Wal-Mart applies to an FLSA action. Judge Berman recently ruled in, I believe it is the Youngblood case that Wal-Mart doesn't have a place in an FLSA case because Wal-Mart involves highly subjective inquiries that simply can't be done on a class-wide basis. It is too individualized.

THE COURT: The issue is whether Wal-Mart was a large opinion which included many things and a huge class and it was Rule 23. The issue is, whether there are individual parts of Wal-Mart that would apply to an FLSA. For example, whether the principle that Wal-Mart set out with respect to the need for an issue, the answer to which is dispositive on an issue in the case and that can be answered on a class-wide basis, whether that applies to the first-step certification in an FLSA action.

Yes, there are differences. The specific Wal-Mart is Rule 23, the unifying principle in Wal-Mart was the exercise of discretion which was unsatisfactory to the Supreme Court. But the question is whether the legal principle set out in Wal-Mart is simply irrelevant, not whether the facts are similar but whether the legal principle that was set out for purposes of Rule 23 is irrelevant to the first step of the collective action determination.

MS. WALSH: So the first step I would say it is absolutely relevant and I would argue that the second step to Wal-Mart doesn't apply.

I do anticipate that if this is authorized to class

members and we proceed as a collective, I do anticipate that the defendants, of course, would raise Wal-Mart in its de-certification motion. And I would expect that they would raise the whole issue of discretion as a basis for de-certifying our class and what they would argue is that the branch managers were not acting as the -- they were acting as rogue managers and they were falsifying their employees' time sheets and putting pressure on their personal bankers and that Citibank corporate did not know anything about it because it gave its branch managers discretion.

This is going back to the sales quotas and the nationwide policies, we would rely on those policies in addition to any other discovery that we uncovered to show that Citibank did not give discretion to branch managers. They kept them on a very tight leash and they --

THE COURT: You have to let me get a word in edgewise, otherwise, you will never hear my question.

What difference does that make for purposes of an FLSA action, because the issue is not whether there was a discriminatory practice as was the issue in Wal-Mart; the issue is whether these people worked and were not paid? So whether the branch managers had discretion or didn't have discretion, there is no dispute that if the people worked the hours and were not paid, they should be paid. And if they were not paid, it is a violation of the FLSA whether the branch managers had

discretion or didn't have discretion. The issue is not whether there was a practice that violated the FLSA in terms of giving branch managers discretion or not; the issue is, were employees working overtime and not being paid, right?

MS. WALSH: I completely agree with you.

THE COURT: Hard to understand how the issue of whether there was discretion or not discretion even is an issue.

MS. WALSH: I hope the defendants never raise it. I am not that optimistic. I think they will raise it down the road, but I completely agree with you, your Honor. This is not a Wal-Mart case. This is not a case involving discrimination and decision-making that --

THE COURT: Isn't the issue whether there were, and you can correct me if I am wrong, a reasonable number of people who worked overtime and were not paid overtime and whether under the FLSA it is appropriate to bring together a collective action on behalf of those people, so you have to know whether there were sufficient people and sufficient indications that there were sufficient people to make a determination on a collective action basis?

MS. WALSH: That's right. That is really the only inquiry at this stage is whether or not we have made a sufficient showing that there are other people other than our clients who worked overtime and were not paid for it. And we

have evidence from California, D.C. --

THE COURT: -- or whether sending out the notice is simply churning litigation which otherwise wouldn't exist?

MS. WALSH: First of all, the remedial purposes of the FLSA are favorable to the plaintiffs in that at this point all we are doing is issuing a notice to the class. We already have the class list identifying the class members. This is merely a time to inform people that they have a possible claim.

THE COURT: Have you been in contact with, if you can say, the various class members? There is only one opt-in.

MS. WALSH: That's right. And what we have done -- and we will be careful here -- I can tell you what we have not done. We have not solicited any clients. We have not sent any direct mailings to the collective members. And we can't be reprimanded -- the defendants were trying to chastise us for not, effectively, soliciting more people from the class list even though we have had it for a while. We have been acting above board and not sending solicitation letters, so we really cannot be faulted for that. We have done two investigations and that is how we have obtained the declarations that we have obtained.

And I can tell you, your Honor, that we have run into a lot of current employees which has constrained our investigation somewhat.

Also, we think that we have obtained testimony from

people in six states out of the 13 states where Citibank does business. And we think that is more than sufficient to satisfy our modest thresholds right now.

In addition, we have gotten some discovery from the defendants in terms of showing emails from regional managers and branch managers which made it pretty clear that Citibank corporate was not condoning the payment of overtime, that they were trying to limit it as strictly as possible. It was part of the company-wide urgent initiative to keep expenses down and --

THE COURT: Yes. There was a company-wide initiative to keep expenses down, to keep overtime down, but emails don't really stand for the proposition that you shall keep overtime down by not paying it when it is earned.

MS. WALSH: I think --

THE COURT: Wholly understanding of having a policy -- don't let people work overtime, we cannot afford it. We cannot afford to pay time and a half.

MS. WALSH: I agree with you that on its face it is lawful to have a policy --

THE COURT: After all of the discovery of the emails there is precious little, except one case where remedy --

MS. WALSH: We have gotten precious little discovery on the topic. We have only gotten emails from the branch managers that supervised our plaintiffs and their supervisors.

THE COURT: There are limits. I have had no objections from the magistrate judge's ruling on my discovery, and there are proportionality limits as to what the appropriate scope of discovery is. You should have gotten the most relevant discovery.

Is it your suggestion that if I were to approve this at the first stage of the collective action, that that would dramatically increase the amount of discovery that you were seeking from the defendant?

MS. WALSH: Yes, because so far we have only been given --

THE COURT: That is a pretty good reason not to certify it.

MS. WALSH: I think, in terms of we have only gotten conditional class certification discovery, we have gotten a very limited amount of information.

THE COURT: But you have had the class list. There is one opt-in. And you say that approving the collective will dramatically increase the discovery. The number of cases that you have come up with where overtime was not paid are relatively few out of a universe of 4,000. And one of the issues then becomes, OK, we have a total number added up -- including putting aside whether they are hearsay or not -- total number of individuals out of 4,000 that you say we have evidence that they were not paid overtime is how many?

MS. WALSH: I would say several dozen, about 27, 28 identified.

THE COURT: You say 27 identified. And you say 4,000 potential. And you say, if you certify this on the first stage, this will dramatically increase the discovery.

MS. WALSH: Down the road as we proceed --

THE COURT: That then is a strong reason not to certify this. 27 individuals out of a class of 4,000. And on the other side you say, if I certify it, it will dramatically increase the burden and cost of discovery in the case and we have evidence because we have 27 people to impose on the defendant individual discovery with respect to 4,000 people.

That's not a good answer. Trust me.

MS. WALSH: Courts have conditionally certified nationwide cases on --

THE COURT: I know that. Usually, a response to a question of what the impact on discovery would be, would be an answer that it will be proportional to what is involved and that you have means and methods of limiting the discovery -- not that certification at the first stage of an FLSA action will impose burdensome cost on the defendant, to cause the defendant to settle a case that might otherwise have been defended.

All of that skews the purpose of the FLSA.

MS. WALSH: If your Honor is concerned about the scope

of discovery, plaintiffs would be open to --

THE COURT: Keep your voice up.

MS. WALSH: If your Honor has concerns about the scope of discovery, we would be willing to engage in some kind of proportional basis on a case-by-case basis.

THE COURT: You say am I concerned. Of course I am concerned. I am concerned partially because of your answer, right? You tell me that if I certify it, that that will dramatically increase the costs of the discovery, right? Right?

MS. WALSH: I think I just backtracked a bit on that, that we would be willing to engage in proportionate discovery. If the Court conditionally certifies, what you can be certain is that we will get notice out to potentially collective members and that's really what is important for present purposes.

I understand your Honor's concern about discovery --

THE COURT: And you say that this case can be easily tried because what you really need is the audit records which just show when did people check in, when did they leave and what were they paid, right?

MS. WALSH: They showed when people checked in and when they left.

THE COURT: So that you could see whether they worked overtime or not?

MS. WALSH: I think that definitely that would be very helpful in that regard, sure.

THE COURT: The rule says the Court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rules if it determines that the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues. The Court must do that.

And you say, if I grant your motion, the scope of discovery will be "dramatically increased" because you have 27 individuals out of a potential collective class of 4,000.

MS. WALSH: Right. Like I said, your Honor, we are open to engaging in some kind of step-by-step discovery process, something that would satisfy your Honor's concerns that the defendant is being overly burdened in the early stage of the litigation. But there is nothing in the FLSA that says you cannot send out notices -- that's what we are really trying to get at here is sending out notice to potential class members. And the showing that we have to make in order for us to do that, your Honor, is very minimal.

THE COURT: What do you think are the strongest cases that you have with respect to certifying a comparable class with the showing that you have made and the number of potential

people not paid overtime?

MS. WALSH: One of the strongest cases I would say is Gilbert. It is a California case, but it was the same defendant. The case was filed in 2008. The California court certified a nationwide class of Citibank business bankers which are the business equivalent of personal bankers. They allege very similar facts to what we have here, and I believe that was based on only four declarations.

THE COURT: It was a smaller class, wasn't it?

MS. WALSH: Yes, presumably, it was a smaller class.

THE COURT: It was how many, 2,000 versus 4,000?

MS. WALSH: I am not sure exactly how big the class was. I believe the ultimate opt-in was several hundred.

THE COURT: Any other case but Gilbert?

MS. WALSH: Hallissey v. AOL.

THE COURT: Keep your voice up.

MS. WALSH: Hallissey V. AOL, Southern District, certifying a class of 13,000 former AOL community leaders. There were 12 plaintiffs and their supporting affidavits.

THE COURT: Any other?

MS. WALSH: The other, it is not a nationwide class but the courts have certified a reasonable amount of people in the class based on --

THE COURT: -- groups of restaurants in the New York City area.

MS. WALSH: That's correct.

THE COURT: I know.

If I were to certify a collective and you've had so few people want to opt-in so far, and affidavits from some others, why should discovery be increased in any way until we see how many people opt-in? There may only be a few hundred who opt-in to your collective. If there are a few hundred people who opt-in to your collective, why should you be able to -- as your words were -- to dramatically increase the amount of discovery?

MS. WALSH: I think what your Honor is saying sounds pretty reasonable. We do have some leftover conditional class certification discovery that we were at an impasse with the defendants on it and there were some search terms we have been haggling over. We would, at a minimum, want to get the rest of that discovery because it has been ordered.

THE COURT: Well, if it was ordered then --

MS. WALSH: We should have it by now, frankly. It has taken quite awhile, your Honor, for us to get these documents from the defendants. So it is kind of tough to defend our seeming lack of evidence when we have had to pull every single document out of the defendants --

THE COURT: All right. Thank you.

MS. WALSH: Thank you.

THE COURT: Yes.

MR. LINTHORST: As the Court is aware, the Supreme Court has indicated that a collective action should proceed only in appropriate cases. And the showing that plaintiffs have to make is that they are bound together by a factual nexus that they are all victims of a common and unlawful policy. So the similarly situated requirement, even at the first stage has to at least be tethered to a common and unlawful policy.

Of course, as the Court noted, they are similarly situated in a lot of irrelevant ways. They are all bound by Citibank's policy on taking bereavement leave, but has nothing to do with claims for working time that is compensable under the FLSA and not being paid for it with the supervisor's knowledge or whether they should know it.

And the Second Circuit in the Myers decision has indicated that that showing cannot be made on unsupported assertions.

The decision to grant conditional certification is a significant point in the case. It is a significant one to Citibank, and it is a significant use of the Court's power to authorize notice to thousands of current and former employees suggesting that Citibank has violated the law and potentially turning Citibank into direct litigation adversaries with a significant number of its current employees.

THE COURT: Only those who opt-in.

MR. LINTHORST: That's correct.

THE COURT: And the notice would indicate it is those who, in words or substance, believe that they have a claim because they worked overtime and were not paid, right?

MR. LINTHORST: We would say that any notice should require that. I don't believe the plaintiffs have proposed that but, nonetheless, these are lay people --

THE COURT: What would the notice that the plaintiff want say?

MR. LINTHORST: I don't believe that there is any representation or qualification for opting in, that you have worked overtime without being paid for it.

THE COURT: Is that right? How could the class be determined other than by those who work as personal bankers and who worked and were not paid overtime? The class doesn't include people who have no claim?

MR. LINTHORST: I agree with that, your Honor, but people opt-in when they get a court notice, whether they have a claim or not.

THE COURT: Ms. Steven Walsh, your notice of claim definition of the class is people who worked and were not paid?

MS. WALSH: It is to all persons currently and formerly employed since August 6, 2007 --

THE COURT: Please keep your voice and stand up when you talk.

MS. WALSH: -- by Citibank in a position of personal

banker in the United States to recover unpaid overtime and all current and former personal bankers who were employed by Citibank at any time since August 6, 2004 at Citibank branches in New York to recover unpaid overtime pursuant to New York State labor laws.

THE COURT: Doesn't it have to include some explanation that the members of the class are those -- as you define it in your complaint, I believe -- who worked overtime and were not paid, right?

MS. WALSH: Right.

THE COURT: OK.

MS. WALSH: On page 2, the notice under Section 3 who can join, we state that we sued on behalf of ourselves and all affected current and former employees who are or were employed at Citibank as personal bankers at Citibank branches and who have failed to receive paid overtime for time worked over 40 hours in a week.

We are happy it make it clearer.

THE COURT: Thank you.

MR. LINTHORST: Your Honor, that doesn't demonstrate that they are similarly situated. The consideration for a conditional action is judicial economy. Getting a group of people who all claim that they worked overtime without proper compensation based on their individual circumstances is not a collective action. And the plaintiffs have not articulated any

factual nexus that binds the class to a common and unlawful policy. You just have a small collection of people saying, this is my story. This is what my situation is.

THE COURT: Can I ask you the same questions that I was asking the plaintiff.

Why is that right, essentially?

You are asking, and much of the papers are devoted to whether there is this common policy of setting quotas which require people to meet the quotas or they will be sanctioned, and they can't meet the quotas within a 40-hour week so they work overtime but the company has a policy of not wanting to pay overtime and, therefore, they work the overtime and don't get paid by any one of a number of means. You say there has to be a common policy which is more than simply having people work for you and not paying them overtime, having people who work more than 40 hours and don't get paid. But all of this other stuff that causes that would not be a violation of the FLSA. The only violation of the FLSA is working more than 40 hours and not getting paid.

So my question is, why is it so -- and you can tell me because the Supreme Court has said that -- the relevant be-all and end-all inquiry as the first step of the process?

MR. LINTHORST: Let's break it down a little bit.

So the employer has every right to say, this is what we want from our employees in a 40-hour week.

THE COURT: And every right to say, we don't want you to work overtime, don't work overtime.

MR. LINTHORST: Even as to those aspects of this case, we don't think there is commonality and similarly situated.

The sales quotas were determined on an individual basis. There is wide variety in the sales quotas, even among the handful of folks that are before the Court. There is a wide variety in the overtime. All of the plaintiffs opt-in and declarants recorded and were paid for overtime in over half of their paychecks. Citibank paid almost 8 million in overtime to personal bankers during the relevant period.

THE COURT: 7.8.

What was the total payroll?

MR. LINTHORST: I don't know, but it showed --

THE COURT: In the context of Citibank, yes, I know it shows and each of the plaintiffs were paid some overtime. Does it strike you as an enormous amount of money that was paid in overtime, $7.8 million to all of the Citibank --

MR. LINTHORST: It is not an enormous amount, and there is no requirement to pay an enormous amount.

THE COURT: Of course not. But when that figure gets constantly repeated, it doesn't strike me as saying, of course, it is not reasonable to think that Citibank had a policy of encouraging people to work overtime and not paying them because we paid 7.8 million in overtime.

MR. LINTHORST: I understand, but what is the factual nexus? If Ms. Ruiz can show that despite ignoring her supervisor's request that she take lunch and leave on time and Citibank's policy is to record all of her time, that notwithstanding all of that that she worked overtime, that is compensable under the FLSA standards and her employer knew about it or should have known about it, what does that tell us about a personal banker in Rochester and whether they did each of those things?

It tells us absolutely nothing. If a personal banker in Rochester said, I also didn't get overtime, then litigate those issues for them, but there is no factual nexus between them that will result in any judicial efficiencies that would cause us to have to invite claims to be filed that would never be filed, to be concentrated in the court when we know now there is no articulated connection, there will be no judicial efficiency and we are just going to have a whole bunch of individual claims that have been stirred up and never would have been filed.

THE COURT: Isn't that always the case with respect to an FLSA hours worked and not paid, as opposed to a misclassification case; you always have to ask with respect to each of the employees, what hours did they work and weren't they paid?

That's an FLSA case. What are the efficiencies? You

might be able to gather all of the records together, what hours did they work. Plainly, the defendant has to be allowed to defend each of those individual claims.

MR. LINTHORST: What causes courts to certify is something more. They are at a restaurant where a manager told them, you have to work off the clock. That is a common factual nexus. They still have to show that they worked there and it was compensable. They have shown that their employer -- their manager told them. If you have enough people coming and saying, yeah, this manager said that, then you have a common factual nexus that binds this group of people. When you have a thousand locations nationwide, 4,000 people and an equal number of branch managers, you don't have that factual nexus.

THE COURT: You don't really think that as a result of the opt-in, you would get 4,000, right? You don't think that you would get more than a relatively small number, right; if you got a relatively large number, it would tend to support the plaintiff's allegation?

MR. LINTHORST: I don't think there is going to be 4,000, but what if it were 400? That is a lot of claims that never would have been filed. Citi now is adverse to 400 people, many of whom could be current employees. If we have no reason now, no articulated factual nexus that binds them together, then notice shouldn't go out to get those claims.

THE COURT: What do you think are the strongest cases,

given the lenient standard under the first stage of collective action certification, where it's been denied?

MR. LINTHORST: I think Eng-Hatcher v. Sprint, Nextel.

THE COURT: That was Judge Jones' case.

MR. LINTHORST: Judge Jones.

THE COURT: There was only one plaintiff there?

MR. LINTHORST: There was one plaintiff. She pointed to 600 other pending cases and other internal complaints as well as the same type of evidence that plaintiffs here submitted like I knew other personal bankers who told me that they were not paid overtime.

Simmons v. T-Mobile.

THE COURT: What court?

MR. LINTHORST: Southern District of Texas.

Those two cases are similar because they are sort of de facto -- you had this lawful policy that must have resulted in a nationwide unlawful policy and they declined to certify.

There are a number of cases that we cite on page 15 of our brief that are not that specific theory but say, where the employer has a policy against off-the-clock work, does claim to pay overtime, the plaintiffs' allegations are, essentially, that they were the victims of rogue managers. That is the Brickey case out of the Western District of New York, the Steaver case out of the Western District of New York and the Diaz case out of the Western District of New York.

I just want to touch base on the cases that the plaintiff cited.

The Gilbert case was a case where during the limitations period, the business banking officers had been classified as exempt and were challenging that exempt classification. It also included after the reclassification, but my read on the decision is that the misclassification seems to drive the decision, so there was not a lot of analysis on the off-the-clock piece.

The Hallissey case was a case where all of the reputed class members were classified as volunteers so they didn't get any overtime or any payment at all. So that was a common factual nexus that bound them together.

I just want to touch base on the discovery.

We are not at the outset of this case. We are 16 months into the case. Plaintiffs were afforded a significant period in which to conduct discovery, to marshal the evidence to support their motion.

At the Court's direction we produced the class list with over 4,000 personal bankers. While we certainly didn't think that was license for plaintiffs to go soliciting claims, it certainly gave them the tools they need to investigate and find evidence of a common factual nexus of a much larger group of people.

We also went through email discovery. And,

essentially, where we landed is, we conducted email searches through a little more than 50 custodians. These were all of the branch managers for the plaintiffs and the opt-ins. These were the branch managers for 10 additional branches -- not randomly selected, but selected by the plaintiffs. So these, presumably, are the branches where they think you are most likely to find off-the-clock violations. It was the area manager.

So the hierarchy is: Personal banker, branch manager, area manager, division director. So we have also searched all of the emails of all of the area managers with responsibilities for the plaintiffs, all of the division directors with responsibility for those area managers. So you ended up searching the emails of 35 branch managers, a number of area managers who have responsibility across five states, and division directors who, I am told, had responsibility for almost all of the branches nationally. We negotiated 82 searches to look for emails through these custodians, obviously tailored to the allegations in this case -- on overtime, on monitoring, reducing expenses -- all of these things. 82 different searches and we produced the results to the plaintiffs and the plaintiffs have gone forward with what they think from what the evidence shows.

And we respectfully submit that it doesn't show anything, that it confirms no common policy of failing to pay

personal bankers off the clock. They found potential violations in two branches, one of which was remedied long before the case was ever filed, the other in which the net effect of what was being directed was to overpay the employee by 14 minutes --

THE COURT: I have read those supplemental submissions.

MR. LINTHORST: There is nothing we have been ordered to produced that we haven't produced.

THE COURT: There is a motion to strike. Let me just make an observation on that.

As I read the motion, there is no case in the Southern District of New York which has granted a motion to strike. There is one case, perhaps, where a judge in the Southern District has said, I am not going to consider this hearsay, but the motion to strike is -- was there permission to file the motion to strike or was it just filed?

MR. LINTHORST: I believe it was just filed.

THE COURT: One reason why it is not a great idea is that it really appears like an effort to circumvent the page limits by saying, your evidence is no good and here are 10 pages in which I am going to explain to you why your evidence is no good. And the reason I suspect there are no cases in the Southern District is, we discourage it. We set page limits for a reason and perfectly able in the motion itself to say that

the evidence in support of the motion doesn't support the motion because it is based upon on hearsay or double hearsay -- just an observation on motions to strike.

MR. LINTHORST: No. I appreciate that, your Honor. That was not our intent. Our intent was to make sure that we preserved the evidentiary objection to the hearsay.

THE COURT: All right. Anything else?

MS. WALSH: Your Honor, can I address --

THE COURT: No. Hold on.

MR. LINTHORST: Your Honor, I just would respectfully submit that Citibank has done what it can do to comply with the FLSA. It has a policy. It trains its managers. It enforces by threat of discipline.

Employers are searching for a way to not be sued all the time and face this low standard where, with no determination, they have potentially hundreds of claims against them which creates pressure to settle, which creates problems. There has to be a standard at the first level that gives employers the incentive to comply with the statute and not be worn down by case after case involving a collective action.

Thank you, your Honor.

THE COURT: Thank you.

Yes.

MS. WALSH: I would like to address defendant's argument that you can't predicate an FLSA violation based on

two lawful policies, on the one hand, requiring that people --

THE COURT: Would you use the mic.

MS. WALSH: Sure.

The defendant has argued that you cannot predicate an FLSA violation based on the existence of two competing but lawful policies such as having people work very hard versus wanting to control costs on the other hand.

The Courts have certified classes under these very scenarios. One of the cases we rely on in our brief is the Levy v. Verizon Info Services decision. That's in the Eastern District. It is a 2007 decision. The court conditionally certified a class of telephone sales representatives who basically made the same type of allegations that we are making here, that their managers required that the sales representative be paid for overtime only if they were preapproved for the overtime.

THE COURT: Next.

MS. WALSH: Also, another very good decision in our papers is Falcon v. Starbucks decision.

THE COURT: Right.

MS. WALSH: If I may provide one authority to your Honor, to the extent that the Court is concerned that we have not identified more than a few dozen opt-ins into the case, in the Second Circuit, we are not required to identify a certain threshold amount of opt-ins. We had to make a minimal showing.

The Cuzco v. Orion Builders decisions states that the plaintiff is not required to indicate specifically how many potential opt-in plaintiffs may join the suit nor must the plaintiff join with other potential plaintiffs at the time his is filed in order for a representative action to be precertified.

The whole point of sending notice to the class is to enable us to identify these additional collective action members. If people have a claim, then they simply won't opt-in.

THE COURT: Thank you.

I will take the motion under advisement.

I appreciate your briefs. I appreciate the argument.

Thank you all.

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